United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-1317

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1317

UNITED STATES OF AMERICA,

Appellee,

—v.—

GENE LOY CHU,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT GENE LOY CHU

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Preliminary Statement

Appellant Chu respectfully submits this brief in reply to the prosecution's answer on this appeal.

POINT I

REPLYING TO THE PROSECUTION'S CLAIMS THAT NEITHER A MISTRIAL NOR A HEARING WAS REQUIRED BECAUSE OF THE MID-TRIAL PUBLICITY

A. Mistrial

The robing room questioning of only one of "about 10" of the other jurors was not sufficient to reinforce the conclusion that nothing Mr. Agoney [the juror who saw the broadcast] had said had "polluted" the jury (GB 13). And the court's questions to the other jurors in open court, for the reasons stated in our main brief, and for the reasons underlying the promulgation of the ABA Standards, did not "more than adequately insure" that the other jurors had not been affected (GB 13). Nor was it determined that "none of the other jurors had been informed of the substance of the program" (GB 13).

First, the only other juror who was questioned, Mrs. Lynch, said that Agoney said the broadcast had been "the exact same case, only it was down in Florida" (A 491). Her information therefore was precisely of "the substance of the program", as the broadcast transcript discloses (A 1444-1445).

Second, no other juror -- even in open court -- was asked what information Agoney had imparted. Judge Conner asked simply whether any juror had received the impression of "whether or not there was any opinion expressed by the commentator about the general subject of marriages between aliens and citizens" (A 505-506). The question did not call for what the jurors actually had heard Agoney say about the "substance of the program", as the prosecution contends, and in its limited form deprived the defense of even that objective evidence of possible bias.

Finally, both the question, and the instructions which followed, were asked and were given in open court, with the negative effect on free expression which now is recognized as inherent in open court interrogation. Without private individual interrogation, no assurance of fairness was possible. The protection of private individual interrogation would not have taken long. See, United States v. Colabella, 448 F.2d 1299 (2d Cir. 1971), cert. denied, 405 U.S. 929 (1972). Its absence requires reversal.

Further, contrary to the prosecution's contention, (GB 15), the defense in fact was "forced" to retain Agoney for the reasons expressly stated at the time and repeated in our main brief (A. 502; DB 10). There is no merit to the

ingenious claim that Agoney's dismissal could just as well have caused speculation negative to the prosecution (GB 15, fn.**). And, even weighing this unlikely possibility, our point in any event was and is that Agoney's dismissal would have caused speculation, that speculation should not intrude on any trial, much less one that is criminal, that Agoney therefore could not safely be dismissed, and that a mistrial was the only appropriate alternative to individual robing room interrogation of the jurors.

Finally, it cannot in this instance fairly be claimed that Chu must bear the "consequences of his informed choice", and should not be allowed to take advantage of "invite[d] error" (GB 15-16). Our precise point is that the defense, while certainly informed, had no choice for the reasons given then and now. Nor did the defense "invite error" by lying low with a truncated objection. Its objection and reasoning was fully placed before both the prosecutor and the trial court. No traps were laid. If error was invited, with all respect we submit it was the prosecution which did the inviting, since an appropriate robing room voir dire surely would have resulted had the prosecution joined in defense counsels' request that one was required.

B. Hearing

The right to apply for a post-trial hearing was expressly reserved at the trial (A 504). The transcript of the broadcast was obtained and provided with full briefing. The transcript and the trial record in themselves were more than sufficient to require a hearing. The very clear inference from the transcript was that the broadcast had resulted from government initiative at worst, and with government cooperation and sanction for sure. The very purpose of a hearing was to obtain legal process pursuant to which a full exploration of the broadcast's genesis could have taken place.

There is no merit to the prosecution's claim that evidence of government initiation, cooperation, and knowledge is immaterial (GB 17). Its case authority for this proposition is aged, and, moreover, in itself depended upon adequate voir dire procedures which were lacking in this case.

INS is a part of the Department of Justice. Chu's case was its case. In a similar and even less pernicious situation, the First Circuit reversed a conviction because of mid-trial publicity, and held, United States v. Coast of Maine Lobster Co., __ F.2d __; Docket No. 75-1431, 1st Cir. May 10, 1976, at Slip Op. p. 6:

> "Statements that a prosecutor makes while a trial is pending and which forseeably may be made public while the trial is pending, stand on a different footing."

In the Coast of Maine case, defendants had been on trial for a week for mail fraud when, over the weekend, the United States Attorney appeared on a local television program and gave his opinion that white collar criminals were receiving too lenient treatment. The broadcast received press coverage the next day. An open-court voir dire was conducted and the trial continued to the conviction which was reversed.

The First Circuit specifically noted that the publicity "made no reference to the defendants or to the pending trial." In substance therefore the publicity was less pernicious than in Chu's case, where the broadcast content was on all fours, and where the one non-viewing juror who was interviewed said Agoney, who had seen the broadcast, said it was "the exact same case, only it was down in Florida."

The Chu case was an INS case. INS is a part of the Department of Justice which was prosecuting the case. The transcript of the broadcast evidences INS initiative at worst, and full coperation and sanction for sure. It also was a broadcast which INS had to know "foreseeably [might] be made public while [Chu's] trial [was] pending . . ." The Coast of Maine case therefore adds considerable force to our claim that a reversal is required. At the least, and coupled with this Court's own views on trial voir dire as expressed in the Colabella case, supra, it calls for remand and an evidentiary hearing.

POINT II

REPLYING TO THE GOVERNMENT'S CONTENTION THAT THE GIVING OF A RECKLESS DISREGARD CHARGE IN THIS CASE WAS PROPER

The prosecution, while totally ignoring the fact that the prosecution witnesses testified that Chu was specifically told that the alien and citizen spouses were not living together as husband and wife, i.e., had actual knowledge, argues that a recklessness charge was appropriate in this case. It relies on United States v. Sarantos, 455 F.2d 877 (2d Cir. 1972). However, it is clear from a reading of Sarantos that there was no direct evidence of actual knowledge in that case and that an instruction on inferring knowledge from the alleged recklessness of the defendant, if a proper instruction at all, was acceptable in that circumstance. Id., 455 F.2d at 880.

In Chu's case the prosecution offered abundant direct evidence of actual knowledge on Chu's part and argued the case to the jury upon the precise theory that actual knowledge had been proved directly. The question -- as posed by the prosecution and its own witnesses -- was one of strict credibility. Now the prosecution speculates that the jury could have rejected all of its proof and the theory of its summation and still have convicted Chu on a theory of recklessness (GB 21). This claim impeaches the prosecution's

trial posture, seeks to sustain guilt on a theory never presented to the jury by the prosecution itself, and totally ignores the real trial context and the manner in which the issues of Chu's guilt or innocence was framed at that time.

The recklessness instruction should neither have been requested nor given in these circumstances. Cf., Ashe v. Swenson, 397 U.S. 436, 444 (1969). This Court has recognized on several occasions that employment of a recklessness instruction tends to imply that something less than actual knowledge is sufficient to convict, and therefore tends effectively to lower the prosecution's burden of proof and to obscure the vital distinction between liability for negligence and criminal liability. See United States v. Gentile, 530 F.2d 461 (2d Cir. 1976); see also, United States v. Bright, 517 F.2d 584 (2d Cir. 1975); United States v. Jacobs, 475 F.2d 270 (2d Cir. 1973); United States v. Brauer, 482 F.2d 117, 129 (2d Cir. 1973). This recognized danger at the least should mean that a recklessness instruction should not be sanctioned where substantial direct evidence of actual knowledge is present, and where the prosecution itself relies solely upon the argument that actual knowledge has been proved

directly. * In the circumstances of this case, the request and use of the recklessness instruction was inappropriate and deprived Chu of a determination of his guilt or innocence on the issues as they were actually framed at the trial, both in the evidence and in the prosecution's own argument.

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* In a very real sense, the use of a recklessness instruction in these circumstances intrudes upon the Sixth Amendment right to the effective assistance of counsel. When the prosecution does not argue recklessness as a theory of guilt, the defense cannot practically argue <u>against</u> recklessness as a theory of guilt. A trial lawyer just cannot raise straw horses. He or she can only meet the issues as the prosecutor raises them. If the prosecution chooses to rely on recklessness as a theory of guilt, then it really should be required to argue it. The defense can then respond. Otherwise, as in this case, concepts of recklessness enter the case for the first time when the court charges. The impact on a jury can be devastating.

POINT III

REPLYING TO THE PROSECUTION'S CLAIM THAT THE CONSPIRACY CHARGED WAS PROVED

Except for a fleeting truncated footnote reference (GB 25, fn.) *, the prosecution virtually concedes that the evidence in this case was insufficient to establish the single conspiracy charged in this indictment. The prosecution nonetheless argues (a) that a single conspiracy was proved as to Yu, Fong, and Chu, although barely, and, in what appears to be its real claim, (b) that in any event, since Chu was at the hub of all the conspiracies proved, he was in no way prejudiced by the proof of multiple conspiracies.

These arguments simply miss the point. The thrust of Chu's contention is that knowledge that the marriages were arranged, that the citizens' spouses were paid for entering into the marriages, and that the marriages were entered into for the purpose of obtaining United States citizenship, was not sufficient to establish the conspiracy to defraud which was charged. Evidence of a specific intent

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* The argument in that footnote -- that the connections between some of the spouses may have shown that they conspired with each other -- is without merit. Similar connections between spoke conspirators were regarded as insufficient in United States v. Branker, 395 F.2d 881 (2d Cir. 1968). See Government's Brief in the Branker case.

to defraud was required, and for this purpose the prosecution was required to prove that Yu and Fong knew that valid New York marriages -- as these were beyond dispute -- were not sufficient in themselves for immigration purposes. See, United States v. Diogo, 320 F.2d 898 (2d Cir. 1963). Since there was no evidence to support even the inference that Fong or Yu knew that INS requirements were not satisfied by marriages valid under New York law, their membership was not established, and, since Chu thus was left as the only knowing conspirator, Chu had to be acquitted of conspiracy.

The argument that Chu, as the alleged hub conspirator in several conspiracies, was not prejudiced by proof of multiple conspiracies, has nothing to do with the issue. Chu's case was tried and submitted to the jury at the prosecution's request on a single conspiracy theory, namely, that the single conspiracy charged in the indictment had to be proved or else all defendants had to be acquitted on that count (A 1337-1339). The question of prejudice resulting from a variance in proof therefore is not even reached. The situation might be different if the prosecution had requested a jury instruction based upon multiple conspiracies, in which case the issue of prejudicial variance would arise.

But, even though the defense argued the point at trial (A 837-849),* the prosecution continued to insist, as it does here, that a single conspiracy had been proved and never requested a multiple conspiracy instruction. As a consequence, the case was put to the jury on an all or nothing basis. The failure to prove the single conspiracy charged in the indictment therefore mandates a judgment of acquittal as to Chu on that count.

POINT IV

REPLYING TO THE PROSECUTION'S CLAIM THAT CHU WAS NOT ENTITLED TO ONE OR THE OTHER OF HIS ALTERNATE REQUESTS THAT THE JURY BE INSTRUCTED AS TO INFERENCES THAT COULD BE DRAWN BY HIS SILENCE AT 1-130 INTERVIEWS

The prosecution argues that Chu was not entitled to have the jury instructed either (a) that no unfavorable inferences could be drawn from his silence at 1-130 interviews or (b) that no adverse inferences could be so drawn if Chu in good faith believed that he could not speak at such interviews because of the attorney-client relationship.

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* The argument was made at the close of the prosecution's direct case. There was plenty of time for the prosecution to analyze its case, if it had not already done so, and to raise its variance theory in time for Judge Connor to decide it.

Strangely, the prosecution's argument is directed to only the first of Chu's requested instructions. It urges that the attorney-client privilege did not mandate Chu's silence because either (a) the information in question was not part of a privileged communication, (b) the information was received in pursuance of a crime or fraud, or (c), the applicable canons of professional ethics required disclosure to INS that his clients had testified falsely (GB 30-31).

Whatever may be the relative merit or lack of merit as to Chu's first alternate request, and we rely on our main brief in this regard, nothing contained in the prosecution's brief has any bearing on the propriety and necessity of Chu's alternate request for an instruction that if Chu -- in good faith -- believed that he could not speak at the I-130 interviews, then no unfavorable inference should be drawn from his silence. The correctness of this instruction, based as it was on Chu's good faith belief, did not turn upon whether Chu's belief was correct or incorrect as a matter of law. Chu's state of mind was the key issue and whether adverse inferences could be drawn from his silence depended upon whether Chu believed he had a duty to speak. If Chu in good faith believed he had no duty to speak, and that his status as an attorney precluded

him from doing so, no adverse inference could be drawn as to his silence.

The further claim that the error was harmless because the case was not about Chu's silence is spurious. In the context of a trial in which the jury was out for more than two days after only six days of evidence, and where the issue of knowledge was keenly contested, it is impossible to ascertain to what extent the jury's verdict was influenced by Chu's silence when he heard his clients tell INS facts which Chu admitted knowing were false.

The fact that the court told the jury, in discussing the elements of the crimes charged, that silence was not sufficient to establish guilt, in no way alters this result. What is or is not an element of a crime has nothing whatsoever to do with what inferences properly may be drawn from Chu's silence in the circumstances of this case.

Finally, and as relevant on this issue, the prosecution is wrong in its contention that the record does not support Chu's claim that he was not permitted to speak

to his clients during th I-130 appearances (GB 4, fn.**).

See A 1101-1103.

Dated: New York, N.Y.
October 12, 1976

Respectfully submitted,

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Reply Brief is admitted this
12 day of October 1976

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